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Supreme Court of the United States

October Term, 1958

No. 604 MISC.

GRACE FRANK, Administratrix ad prosequendum of the Estate of DANIEL FRANK, deceased,
Petitioner,

against

UNITED STATES OF AMERICA, DANIEL F. KOWALSKI and CHARLES JANUSCZ,
Respondents,

and

DANIEL F. KOWALSKI, CHARLES JANUSCZ and the Cabin Cruiser SEA CAPTAIN, formerly known as the ORION, her engine, tackle, etc.,
Respondents-Impleaded,

and

PAUL F. ZISA, Claimant of the Cabin Cruiser, SEA CAPTAIN.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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At page 11 of the brief in opposition to the petition, the Government states, in footnote 7, that even if the United States could be held liable for the failure of the Coast Guard to render assistance, nevertheless the petition should not be granted because the District Court allegedly found (Pet. App. 22) that petitioner had failed to establish the necessary "causative" relation between the alleged negligence and Frank's death.

It will be noted that the Trial Court's original opinion was devoted solely to the question of law involved in

this petition; and the supplemental opinion was primarily concerned with factual findings, in order that the record might be more complete on the appeal. It may be safely assumed that if it was the Trial Court's conclusion that there was no causal relationship between the fault and the resulting death, a simple statement to that effect would have obviated the necessity for any appeal or review by higher courts.

The thrust of the Trial Judge's conclusion, with regard to the question of causal relationship is found in the following sentence of the supplemental opinion: "I suppose that the negligence on the operational level and the unseaworthiness of the vessel contributed in some degree to the death of the decedent. * * * I am confronted here generally with the same dilemma as the Court was confronted in the following cases: *Kirinicich v. Standard Dredging Co.*, 112 F. 2d 163 (C. A. 3, 1940); *Harris v. Pennsylvania Railroad Co.*, 50 F. 2d 867 (C. A. 4, 1931); *Zinnel v. United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (C. A. 2, 1925)" (Pet. App. 22).

The Trial Court also observed that had it not been for the shoreside gross negligence and unseaworthiness, Daniel Frank "might have been rescued" and stated that it realized that this was "almost" a speculation. It is significant that the three cases which the Judge cited were all decisions in which that speculation was resolved in favor of the plaintiff or libellant. Indeed, the Trial Court had no alternative but to resolve this issue in favor of libellant, as it did, in view of the uncontradicted evidence.

Bove, the Coast Guardsman in charge of the lifeboat, testified (p. 43):

> "Q. At the time when Bauer went forward was your lifeboat close enough to throw a life ring to the two men in the water? A. Yes."

(Pages 44-45):

"Q. At the time when your lifeboat first came to the two men in the water, and you told us that you were unable to reverse, were you close enough to get next to the two men, if the reverse had been in proper operating order?"

(Colloquy deleted)

"A. Well, as I say, nobody can say what could happen. This is only in God's hands. But I say if I had a reverse I could have gotten that man."

Mr. Recker, another of the Coast Guardsmen in the lifeboat, testified as follows:

(Page 95):

"And then we started to make our passes to pick these two men out of the water. On our swing around it looked to me that they were both swimming, just waiting for us to effect the rescue. We made our first pass, but it was too far away. Then I was yelling to Bove to back it down, and I immediately knew what the trouble was, that it just wasn't going to back down. Then—

Q. Excuse me for interrupting you. At that particular point if the Coast Guard vessel had backed down, will you state an opinion, with a reasonable degree of certainty, whether the rescue could then have been effected? A. Yes, sir.

Q. What is your opinion? A. I am almost positive that if the clutch had been in proper operation we could have got both men.

The Court: Were you that close to them?
The Witness: Yes, sir."

(Page 98):

"Q. About a foot. Now, at that particular time, when you came for the life ring, were you close enough to the men to have thrown them the life ring if it had not been secured in the manner in which you have described and it had been in the

proper way? A. Yes. That's what I tried—when we made this first pass we could have effected the rescue if the boat had stopped, and it had been able to back down and hold it right there for a minute, and that life ring would have been free, I could have put the life ring approximately on top of both men. As it was, both men were in the water, one appeared to be just floating there, as if nothing was going on, he was just waiting for us to pick him up."

Coast Guardman Recker also testified that at first he was under the impression that the two men in the water were swimming, and later he saw Danny Frank submerge three times before said Danny Frank went down for the third and last time (pp. 99-100); that when the Coast Guard boat made its first pass, Daniel Frank appeared to be floating as if he were swimming, for he was spitting out of his mouth, and his eyes were open (p. 104).

The third Coast Guardsman, Mr. Bauer, testifying as a witness for the government, did not contradict the foregoing testimony. He confirmed that he had also tried to throw the life ring, but it had previously been so improperly secured, that he could not free it when it was needed (p. 196).

Mr. Hacker, the person in charge of the Coast Guard station, also testifying as a witness for the government, testified that in making out the official Coast Guard report of assistance within twenty-four hours after the occurrence (p. 253), he had interviewed his subordinate, Coast Guardsman Bove, and had agreed with his conclusions that inability to get the life preservers free on the Coast Guard vessel, so as to throw them to the men in the water, was one of the causes for the loss of life (p. 254). He further testified at page 255:

"Q. And another cause for the loss of life attributed by Bove in his official report to the Coast Guard was to the difficulty in maneuvering the C. G. 36363 due to very rough weather and uncertainty of

operator of reverse mechanism, is that right? A. That's right, yes.

Q. And you read that before you signed it and endorsed this report? A. Yes, sir.

Q. First-I wonder if you would be kind enough to tell me whether you agreed with those conclusions before you affixed your signature. A. Yes, sir."

Furthermore, the Trial Court's supplemental opinion points out that the "Report of Assistance" (which was placed in evidence, and which as stated above, was made out by the man in charge of the Coast Guard boat within twenty-four hours after the occurrence) noted that Daniel Frank's loss of life was due to "a combination of the following circumstances: 1. Equipment failure on Orion in that handrail carried away. 2. Inaccessibility of life preservers on Orion and failure of lifeboat crew to get life preservers free and thrown to men in water. 3. Difficulty in maneuvering C. G. 36363 due to very rough weather and uncertainty of operator of reverse mechanism".

It is, therefore, clear from the undisputed evidence in this case that Daniel Frank's loss of life was at least due to the Coast Guard's operational negligence in the manner in which the life preservers had been secured while its boat was ashore, as well as the well-known faulty mechanism of the Coast Guard boat.

The very cases cited by Judge Modarelli in his supplemental opinion showed that he was resolving that question of fact in favor of the libellant, and that he recognized that any other finding by him on that issue, would constitute reversible error.

The first case the Trial Court cited on the issue of causal relationship was *Kirinicich* v. *Standard Dredging Co.*, 112 F. (2d) 263 (C. A. 3rd, 1940), a case in which a worker on a dredge fell overboard at about 4 A. M. "The dawn had not yet lightened the darkness." Defendant's employees threw him some lines, but not a life preserver.

The Trial Judge dismissed the libel on the ground that there was no proof that the deceased would have been rescued had the life preserver been thrown to him. In his opening sentence, Circuit Judge Clark, on the appeal, labelled the decision of the Trial Court as "judicial stigmatism", and at page 164, he stated:

> "In the light, then, of this logic and these examples, would Kirinicich have drowned even if a larger and more buoyant object than the inch heaving line had been thrown within two feet of him? If he could swim, even badly, there would be no doubt. Assuming he could not, we think he might (the appropriate grammatical mood) have saved himself through the help of something which he could more easily grasp. We can take judicial notice of the instinct of self preservation that at first compensates for lack of skill. A drowning man comes to the surface and clutches at what he finds—hence the significance of size and buoyancy in life-saving apparatus."

The next case cited by Judge Modarelli under this point was *Harris* v. *Pennsylvania Railroad Co.*, 50 F. (2d) 866 (C. A. 4, 1931). In that case, a man fell from a carfloat. His cry was heard as he went into the water. After striking the water he reappeared on the surface of the water, and "seemed to be swimming or treading water", but then he went down and there were only some bubbles there. This also happened during the night. A line was thrown to him, but although a life ring was available, it was not thrown to him. The Trial Judge dismissed the case on the ground that "even if additional steps had been taken, it was still merely a matter of speculation as to whether the deceased would have been able to have availed himself of them so as to be saved." In reversing this decision, Circuit Judge Soper stated at page 869:

> "These obvious facts lead us to conclude that there was evidence of negligence on the part of the crew, and further that it was for the jury to decide whether the man could have been saved if due diligence had

been used. The deceased, even when last seen, was within 200 feet of the point at which a life ring, if promptly thrown, would have rested on the surface of the water. He was evidently making every possible effort to save himself. Whether in any event he would have succeeded is not a certainty, but in our view there was enough testimony tending to show a reasonable probability of rescue, had a life ring or heaving line been used, to justify the submission of the question to the jury."

In *Zinnel* v. *U. S. Shipping Board, etc.*, 10 F. (2d) 47 (C. A. 2, 1925), the Trial Judge had also dismissed a wrongful death action arising at sea. In reversing the decision of the Trial Court, Circuit Judge Hand stated at page 49:

> "There of course remains the question whether they might have also said that the fault caused the loss. About that we agree no certain conclusion was possible. Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it."

The liability of the government is not lessened by the fact that the Orion had a defective handrail, which caused Daniel Frank to be precipitated into the sea; nor is it relieved from liability because the seas had become choppy, thereby making the rescue attempt perhaps more difficult. As Judge Modarellii stated in his supplemental opinion in the suit at bar:

> "I think it was reasonably foreseeable and to be anticipated that this boat would be used in towing and rescue operations and that the success of its mission might depend on its being properly equipped, manned and seaworthy."

In *Chicago, Rock Island & Pacific R. Co.* v. *Goodson*, 242 F. (2d) 203 (C. A. 5, 1957), it was held that in a per-

sonal injury action, one need not prove that the negligent act of a defendant was the sole proximate cause for the accident. One may recover on a showing that it was reasonably foreseeable that a chain of causation might be set up in which a defendant's negligence, combined with other events, might cooperate in causing the resulting injury. Thus, Circuit Judge Tuttle stated at page 207:

> "As stated in *Hopson* v. *Gulf Oil Corp., supra*, cited by appellant in its brief:
>
> > 'In using foreseeableness as a test to determine proximate cause, this Court and the Courts of Civil Appeals have been careful to point out that for the defendant's negligence to be regarded as a proximate cause of the plaintiff's injury it is not necessary that the defendant should or would reasonably anticipate the very consequence or the exact nature of the plaintiff's injury or the precise manner of its infliction. It is sufficient that the defendant would reasonably have anticipated consequences or an injury of the general nature of that which ensued.'
> >
> > • • •
> >
> > 'The intervention of an unforeseen and unexpected cause is not sufficient to relieve a wrongdoer from consequences of negligence, if such negligence directly and proximately cooperates with the independent cause in the resulting injury.' (citing cases)
> >
> > 'What has just been said of course disposes of the contention that there should have been a charge on sole proximate cause.'"

See also *Dunham* v. *Village of Canisteo, et al.*, 303 N. Y. 498, 104 N. E. 2d 872 (1952), where the Court stated at page 504:

> "It is, of course, well settled in this State that when there are several proximate or efficient causes contributing to death, the death may be attributed to any or all of those causes" (citing cases and the Restatement of the Law of Torts, Section 879).

Conclusion

The issue here is clear. An important question of law is involved. The Government ought not to be permitted to avoid a review of this important issue by seeking to divert the attention of the Court from that point by suggesting that the Trial Court here had not found causal relationship. If the Trial Court had not found causal relationship, it would not have written two opinions, nor would it have cited cases which resolved that question in each instance in favor of the person whose life would probably have been saved, had it not been for the negligence or fault involved.

Dated: New York, New York

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